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Federal Communications Commission  
Office of Secretary

Elizabeth Holowinski  
(Maryland Bar Only)

March 26, 1998

BY HAND

Ms. Magalie R. Salas  
Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, D.C. 20554

96-45

Re: Petition of Microdevices Worldwide Inc.

Dear Ms. Salas:

On behalf of our client, please find enclosed an original and five copies of a Petition for Partial Waiver or, in the Alternative, Clarification of Microdevices Worldwide Inc. with respect to Universal Service contribution requirements contained in Section 54.703 of the Commission's Rules, 47 C.F.R. § 54.703 (1997).

Please acknowledge receipt of this filing by file-stamping and returning the extra copy provided for this purpose. All communications regarding this filing should be directed to the undersigned.

Sincerely,



Elizabeth Holowinski,  
Counsel for Microdevices  
Worldwide Inc.

Enclosures

cc: All Commissioners  
A. Richard Metzger, CCB  
Linda Armstrong, CCB  
Sheryl Todd, CCB  
Lisa Gelb, CCB  
Melissa Waksman, CCB

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MAR 26 1998

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

Federal Communications Commission  
Office of Secretary

In the Matter of )  
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MICRODEVICES WORLDWIDE INC. )  
 )  
Petition for Partial Waiver or, in ) File No. \_\_\_\_\_  
the Alternative, Clarification of )  
Universal Service Contribution )  
Requirements Contained in Section )  
54.703 of the Commission's Rules )

PETITION FOR PARTIAL WAIVER OR,  
IN THE ALTERNATIVE, CLARIFICATION OF  
MICRODEVICES WORLDWIDE INC.

Elizabeth Holowinski  
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COUNSEL FOR MICRODEVICES  
WORLDWIDE INC.

March 26, 1998

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## SUMMARY OF PETITION

In its Petition, Microdevices seeks a partial waiver of Section 54.703 of the Commission's Rules to be allowed to exclude from its Universal Service contribution base revenues derived from providing services which originate in foreign points and terminate in the U.S., retroactive to January 1, 1998. Alternatively, Microdevices seeks clarification of Section 54.703 to allow carriers to exclude from their contribution base foreign billed revenues derived from communications which originate in foreign points and terminate in the U.S.

As shown below, good cause exists for granting the partial waiver which Microdevices seeks. Under Section 54.703 of the Commission's Rules, Microdevices' total 1998 Universal Service liability will be more than three times its total 1997 interstate revenues combined. Microdevices' foreign competitors, by contrast, are not required to make Universal Service contributions. This perverse result operates to penalize U.S. carriers such as Microdevices while competitively favoring their foreign competitors.

A grant of the partial waiver is in the public interest since it would render the application of Section 54.703 of the Commission's Rules in conformity with Section 254(d) of the Telecommunications Act of 1996 as well as the Commission's own Principle of Competitive Neutrality and general pro-competitive policies.

In the event the Commission finds the partial waiver unjustified, the Commission should clarify that Section 54.703 of its rules permits carriers to exclude from their contribution base foreign billed revenues derived from communications which originate in foreign points and terminate in the U.S. Under the clarification, revenues for domestic interstate calls and calls originating in the U.S. and terminating in foreign points would be included in the Universal

Service contribution base.

This clarification would enable Microdevices to compete with foreign carriers on a level playing field by eliminating the perverse advantage Section 54.703 currently affords foreign carriers. The requested clarification would also encourage foreign competitive entry into the U.S. market, consistent with Commission policy, since foreign carriers would not incur Universal Service liability on foreign billed revenues for communications originating overseas and terminating in the U.S.

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In the Matter of

MICRODEVICES WORLDWIDE INC.

Petition for Partial Waiver or, in  
the Alternative, Clarification of  
Universal Service Contribution  
Requirements Contained in Section  
54.703 of the Commission's Rules

File No. \_\_\_\_\_

**PETITION FOR PARTIAL WAIVER OR,  
IN THE ALTERNATIVE, CLARIFICATION OF  
MICRODEVICES WORLDWIDE INC.**

Microdevices Worldwide Inc. ("Microdevices"), by its attorney, hereby petitions the Commission for a partial waiver, pursuant to Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3 (1997), of Section 54.703 of the Commission's Rules, 47 C.F.R. § 54.703, to allow Microdevices to exclude from its Universal Service contribution base revenues derived from providing services which originate in foreign points and terminate in the U.S., retroactive to January 1, 1998, or, in the alternative, to clarify that the contribution requirements contained in Section 54.703 of the Commission's Rules allow carriers to exclude from their contribution base foreign-billed revenues derived from communications which originate in foreign points and terminate in the U.S.

## I. INTRODUCTION

Microdevices is a small resale carrier which provides international callback services primarily from the Caribbean and Latin America to the U.S. and other foreign points.<sup>1</sup> All of Microdevices' customers are foreign billed end users. The Commission has found that international callback services advance the public interest, convenience and necessity by promoting competition in international markets and driving down international telephone rates.<sup>2</sup> According to the Commission, callback "is in the best interests of consumers--and eventually of economic growth--around the world."<sup>3</sup>

In its May 7, 1998 Report and Order adopting Universal Service contribution rules, the Commission states, "[s]hould we become aware of any significant competitive concerns in the future [involving our Universal Service contribution rules], we will revisit this issue."<sup>4</sup> As shown below, the Commission's Universal Service contribution rules severely disadvantage Microdevices *vis-a-vis* its foreign competitors which do not contribute to Universal Service,

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<sup>1</sup> Microdevices received its 214 Authorization on May 15, 1995. Overseas Common Carrier Section 214 Applications Actions Taken, Public Notice (May 24, 1995). Microdevices' total 1997 revenues were less than \$5 million.

<sup>2</sup> See In Re VIA USA, Ltd. TELEGROUP, INC. Applications for Authority Under Section 214 of the Communications Act of 1934, as amended, to Operate as International Resale Carriers; DISCOUNT CALL INTERNATIONAL CO. Application for Authority under Section 214 of the Communications Act of 1934, as amended, Order on Reconsideration, 10 FCC Rcd 9540, ¶ 1 (1995) ("VIA USA Order"). International callback is a service which allows customers located outside of the U.S. to access U.S. based international lines. Typically, a signalling call is placed by the originating caller overseas to the callback provider's switch located in the U.S. The switch provides the caller with a U.S. dial tone, and calls are billed at U.S. tariffed rates. Id. at ¶ 3.

<sup>3</sup> Id.

<sup>4</sup> In Re Federal-State Joint Board on Universal Service, Report and Order, 12 FCC Rcd 8776, ¶ 779 (1997)(appeal pending) ("Report and Order").

subjecting the company to undue economic hardship and application of Commission rules which are inconsistent with the Telecommunications Act of 1996<sup>5</sup> as well as the Commission's own policies. Thus, the instant Petition raises the very "competitive concerns" to which the Commission alluded and acknowledged may need to be revisited.

## II. GOOD CAUSE EXISTS FOR GRANTING A PARTIAL WAIVER

Under Section 1.3 of the Commission's Rules, the Commission may waive any provision of its rules upon a showing of "good cause." Good cause is demonstrated where particular facts warrant deviation from the general rule and where a waiver is in the public interest.<sup>6</sup> As the Commission is aware, waivers have a "pivotal importance in sustaining the system of administration by general rule."<sup>7</sup> Application of a general rule may not be in the public interest if extended to a petitioner whose special circumstances produce results which undermine the policy served by the rule.<sup>8</sup> Thus, the Commission should seek out the public interest not only in promulgating rules of general application, but even in particular, individualized cases.<sup>9</sup> As demonstrated below, Microdevices' unique and compelling circumstances clearly meet this standard.

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<sup>5</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56-161 (1996)(codified at 47 U.S.C. §§ 151-710 (1996))("1996 Act").

<sup>6</sup> See Northeast Cellular v. FCC, 897 F.2d 1164 (D.C. Cir. 1990); and WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972)("WAIT Radio").

<sup>7</sup> WAIT Radio at 1157 (stating that an agency's discretion to proceed through general rules is intimately linked to the existence of a safety valve procedure for consideration of waiver requests based on special circumstances).

<sup>8</sup> Id.

<sup>9</sup> Id.



A. Unique Circumstances Exist in the Instant Case

Unique and compelling circumstances exist in the instant case which justify a waiver. Absent the requested partial waiver, Microdevices' Universal Service tax will actually be greater than all of its interstate revenues combined.<sup>10</sup> Microdevices' total 1997 interstate revenues were approximately \$28,648.92. Microdevices estimates that its 1998 Universal Service liability (determined using 1997 revenues) will be approximately \$89,392.20 or more than three times its 1997 interstate revenues combined.<sup>11</sup> Surely the Commission did not intend such an irrational result, particularly as it applies to a small company such as Microdevices.

Microdevices only provides limited and incidental domestic interstate services as a convenience to its overseas customers. In fact, less than one percent of Microdevices' total yearly revenues are derived from the provision of interstate services. Almost all of Microdevices' traffic originates in foreign countries.<sup>12</sup> Nevertheless, because of these limited interstate services, Section 54.703 of the Commission's Rules automatically requires Microdevices to contribute to the Universal Service fund based on *both its interstate and international revenues*.

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<sup>10</sup> See First Quarter 1998 Universal Service Contribution Factors Revised and Approved, CC Docket No. 96-45, DA 97-2623, Public Notice (December 16, 1998). Microdevices filed its Universal Service Worksheets with the Universal Service Administrative Company ("USAC") on August 29, 1997.

<sup>11</sup> This estimate was calculated by multiplying Microdevices' January USAC bill in the amount of \$7,449.35 by twelve.

<sup>12</sup> Approximately 94% of Microdevices' total revenue is derived from calls which originate outside of the U.S.

Such a result uniquely impacts Microdevices and imposes undue economic hardship upon the company. Specifically, Section 54.703 irrationally subjects Microdevices to the Universal Service tax, but not its foreign competitors.<sup>13</sup> Microdevices' competitors--foreign carriers which do not provide any interstate telecommunications services yet also terminate calls within the U.S.--are not required to make such contributions.<sup>14</sup> Indeed, in its present form, the rule serves as a strong disincentive for callback companies such as Microdevices to offer any domestic U.S. services whatsoever. As such, these results perversely hinder the ability of U.S. carriers such as Microdevices to effectively compete in overseas markets against foreign carriers.

Unless a partial waiver is granted, the disproportionately large Universal Service bill will have a substantial impact on Microdevices' ability to compete for customer accounts in the overseas marketplace. Microdevices competes with overseas carriers which are entirely exempt from the Universal Service tax. Since its foreign competitors are not burdened with the contribution requirement, Microdevices will be unable to pass on or flow through the Universal Service tax to foreign end users without losing market share. If it did attempt to do so, its overseas customers would simply elect to take service from a foreign competitor not subject to the contribution requirement. The effect which imposition of this competitive disadvantage will have on Microdevices cannot be underestimated. Profit margins in callback are falling rapidly as global telecommunications competition takes hold and overseas telecommunications regulatory

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<sup>13</sup> Report and Order at ¶ 779 (stating that carriers which provide only international services are not required to contribute to Universal Service).

<sup>14</sup> The only difference between Microdevices and its foreign competitors (both of which serve foreign end users) is that Microdevices does in fact provide limited and incidental interstate services.

authorities adopt new deregulatory policies. In this increasingly competitive environment, the current irrational application of Section 54.703 may all but signal the death of many callback operators despite the Commission's findings that callback is in the public interest.<sup>15</sup> Clearly, the Commission did not intend the application of Section 54.703 to have such inequitable and discriminatory effects.<sup>16</sup>

Former Commissioner Chong in her Separate Statement to the Universal Service Report and Order, acknowledges this problem:

I believe that it is inequitable to include international revenues for purposes of calculating a carrier's universal service contribution because it will place any carrier with both interstate and international revenues at an economic disadvantage against other carriers that provide only international service. Once the recently-adopted World Trade Organization Agreement becomes effective, when presumably foreign carriers will compete directly with U.S. companies for the international business of U.S. customers, this disparity will place U.S. carriers at a very real competitive disadvantage.<sup>17</sup>

A grant of this limited waiver will not harm other parties. Based on the public comments received by the Commission in response to a similar waiver request filed by COMSAT on January 9, 1998, few carriers face the anomalous circumstance where their Universal Service

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<sup>15</sup> See supra at n.2.

<sup>16</sup> The Commission recognized that U.S. carriers may be put at an competitive disadvantage by not requiring carriers which provide only international service to contribute to Universal Service. Report and Order at ¶ 779. However, the Commission stated that "any disparity among providers should be minimal..." Id. As demonstrated herein, these disparities as applied to Microdevices clearly cannot fairly and accurately be described as "minimal."

<sup>17</sup> Id. at Separate Statement of Commissioner Rachelle B. Chong, Concurring in Part, Dissenting in Part, at 3.

tax bill will substantially exceed their combined interstate revenues.<sup>18</sup> Perhaps most significantly, a grant of the limited waiver--given Microdevices' small size--will have no discernable impact upon Universal Service funding.<sup>19</sup>

B. The Partial Waiver is Clearly in the Public Interest

A grant of the partial waiver will serve the public interest since it would be in furtherance of both the 1996 Act as well as important Commission policies. As shown below, the partial waiver will render Microdevices' contribution requirements consistent with Section 254(d) of the 1996 Act as well as the Commission's own Principle of Competitive Neutrality and long-standing pro-competitive policies. By contrast, a refusal to grant this limited waiver request will render the application of Section 54.704 of the Commission's Rules, as it applies to Microdevices, to be inconsistent with the 1996 Act as well as Commission policy.

Section 254(d) of the 1996 Act requires that telecommunications carriers providing interstate telecommunications services contribute to the Universal Service fund "*on an equitable and nondiscriminatory basis*."<sup>20</sup> Even though Microdevices provides limited and ancillary domestic services, it is required to base its universal service contributions on both domestic and international revenues. By contrast, its primary competitors, companies which provide foreign-only services, are exempt from universal service assessments altogether, affording such

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<sup>18</sup> See In Re COMSAT Corporation, Petition for Partial Waiver of Universal Service Contribution Requirement contained in Section 54.703 of the Commission's Rules (petition date Jan. 9, 1998) ("COMSAT Petition"). Only six parties commented on the COMSAT Petition, of which one other than Microdevices stated that its Universal Service tax bill will substantially exceed its interstate revenues.

<sup>19</sup> Microdevices' contribution is about .0022% of projected total contributions.

<sup>20</sup> 47 U.S.C. § 254(d) (1996)(emphasis added).

companies a significant competitive advantage.<sup>21</sup> Clearly, contributions are not made on an "equitable and nondiscriminatory basis" in accordance with Section 254(d) when they apply to Microdevices yet do not apply to its foreign competitors. A grant of the limited waiver would remedy this discrepancy in the application of Section 254(d).

In addition, the partial waiver is also justified because application of Section 54.703 of the Commission's Rules to Microdevices produces results inconsistent with the Commission's Principle of Competitive Neutrality. The Principle of Competitive Neutrality requires Universal Service support mechanisms and rules to be competitively neutral.<sup>22</sup> In its Report and Order, the Commission adopted the Principle of Competitive Neutrality because "an explicit recognition of *competitive neutrality in the collection and distribution of funds and determination of eligibility in universal service support mechanisms is consistent with congressional intent and necessary to promote a pro-competitive, de-regulatory national policy framework*."<sup>23</sup>

The Universal Service contribution requirements under Section 54.703 as applied to Microdevices, however, are not competitively neutral. As discussed above, Section 54.703 of the Commission's Rules gives foreign carriers, which do not provide interstate services, an unfair advantage over Microdevices, which must contribute to the Universal Service fund based on both its interstate and international revenues. Because Microdevices competes directly with these foreign, non-contributing carriers, Microdevices is placed at a competitive disadvantage.

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<sup>21</sup> Report and Order at ¶ 779. Foreign carriers terminating calls in the U.S. which do not provide interstate services benefit from the PSTN to the same extent as Microdevices, yet are not required to contribute to the Universal Service fund. In fact, the Commission recognizes this in its Report and Order. Id.

<sup>22</sup> Id. at ¶ 47.

<sup>23</sup> Id. at ¶ 48 (emphasis added).

As such, because Section 54.703 is not competitively neutral as applied to Microdevices, the instant waiver request is justified.<sup>24</sup>

Finally, grant of the partial waiver request would serve the public interest by furthering the Commission's long standing goals of promoting effective competition. The Commission has recognized that private sector competition "dramatically lowers the cost of providing service and stimulates creation of innovative services and investment in infrastructure deployment."<sup>25</sup> The Commission also recognized that global competition will deliver tangible benefits to U.S. consumers, U.S. companies, and the world at large.<sup>26</sup> Further, the Commission has recognized that international callback services promote the public interest by providing "increased competition in foreign markets which places significant downward pressure on foreign collection rates, to the ultimate benefit of U.S. consumers and industry whether located within the United States or abroad."<sup>27</sup> In fact, by late 1997 the Commission acknowledged that callback providers

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<sup>24</sup> Grant of the instant waiver petition would also be consistent with the Fourth Order on Reconsideration in CC Docket No. 96-45, where the Commission exempted broadcasters from Section 54.703 of the Commission's Rules. The Commission held that such an exemption was justified because broadcasters' competitors--cable, OVS, and DBS providers--were not required to contribute and imposing on broadcasters, and not their competitors, Universal Service contribution requirements would put them at a competitive disadvantage. In Re Federal-State Joint Board on Universal Service, Fourth Order on Reconsideration in CC Docket No. 96-45, FCC 97-420, ¶ 283 (December 30, 1997).

<sup>25</sup> In Re Rules and Policies on Foreign Participation in the U.S. Telecommunications Market; Market Entry and Regulation of Foreign-Affiliated Entities, Report and Order and Order on Reconsideration in IB Docket Nos. 97-142 and 95-22, FCC 97-398, ¶ 1 (Nov. 26, 1997) ("WTO Order").

<sup>26</sup> Such benefits include reduced international prices, increased traffic flows, deployment of new technologies, and increased financing for the world-wide network infrastructure. Id. at ¶ 4; and In Re International Settlement Rates, Notice of Proposed Rulemaking, 12 FCC Rcd 6184, ¶ 10 (1996).

<sup>27</sup> VIA USA Order at ¶ 28.

providers have already put significant downward pressure on international settlement rates as well as domestic collection rates.<sup>28</sup>

Yet, as discussed above, application of Section 54.703 of the Commission's Rules places Microdevices at a competitive disadvantage *vis-a-vis* its foreign carrier competitors, thereby reducing the downward pressure on foreign collection rates and decreasing competition in the international marketplace. Because the application of the contribution requirements to Microdevices undermines the Commission's long-standing policies of increasing competition and reducing international prices, the Commission should grant the instant waiver request.

### **III. ALTERNATIVELY, THE COMMISSION SHOULD CLARIFY SECTION 54.703 OF ITS RULES**

Should the Commission not find the partial waiver to be justified, it alternatively should clarify that Section 54.703 of its Rules allows carriers to exclude from their Universal Service contribution base revenues derived from services which originate in foreign points and terminate in the U.S., and which are billed to foreign end users. In para. 779 of its Report and Order, the Commission states, in part, as follows:

Foreign communications are defined as a "communications or transmission from or to any place in the United States to or from a foreign country, or between a station in the United States and a mobile station located outside of the United States. Communications that are billed to *domestic end users* should be included in the revenue base, including country direct calls when provided between the United States and a foreign point."<sup>29</sup>

The second quoted sentence above is ambiguous insofar as it implies that communications that are billed to *foreign end users* may be excluded from a carrier's Universal Service contribution

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<sup>28</sup> WTO Order at ¶ 7.

<sup>29</sup> Report and Order at ¶ 779 (emphasis added)(footnotes omitted).

base. However, neither Section 54.703 of the Commission's Rules, nor the Universal Service Worksheet (FCC Form 457) and its instructions, explicitly provide for the exclusion of such foreign-billed communications revenues from the Universal Service contribution base. Consistent with the apparent intent of para. 779, Microdevices requests that the Commission clarify that Section 54.703 of its Rules allows carriers to exclude foreign billed revenues from their Universal Service contribution base for calls originating in foreign points and terminating in the U.S.

Clarifying Section 54.703 as Microdevices requests would help level the playing field between callback operators such as Microdevices and their foreign carrier competitors. For all of the reasons discussed supra, the requested clarification would enable Microdevices and foreign carriers to compete fairly and even-handedly for foreign accounts since neither would be assessed Universal Service taxes on revenues from such accounts. Such clarification would help eliminate the significant competitive advantage which foreign carriers currently possess, erected by the current perverse application of Section 54.703 of the Commission's Rules which disfavors domestic companies. Under the clarification, only calls which both originate overseas and terminate in the U.S. and are foreign billed, would be excluded from the contribution base. Revenues for domestic interstate calls and calls originating in the U.S. and terminating in foreign points would, of course, be included in the Universal Service contribution base.<sup>30</sup>

This interpretation of Section 54.703 is fully consistent with Section 254(d) of the 1996 Act insofar as providers of interstate telecommunications services would be required to

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<sup>30</sup> Thus, the requested clarification is narrowly tailored to address the specific competitive advantage which Section 54.703 affords foreign carriers which respect to foreign-originating, U.S. terminating traffic.



contribute to Universal Service on an "equitable and nondiscriminatory basis". In addition, this interpretation would further the Commission's Principle of Competitive Neutrality as well as its pro-competitive policies, discussed supra.

Finally, in stark contrast to the apparent current interpretation of the rules, the requested clarification would encourage foreign carriers to enter the U.S. market, thereby enhancing competition. Under Section 54.703 as currently applied, foreign carriers now have a strong disincentive to enter the U.S. market since any interstate U.S. traffic would trigger Universal Service tax liability on all of their international revenues. Specifically, once a foreign carrier enters the U.S. market and begins providing interstate service, it incurs Universal Service liability on both its "interstate and international end user telecommunications revenues."<sup>31</sup> This disincentive runs counter to the Commission's findings that entry by foreign carriers into the U.S. market serves the public interest by increasing competition, promoting lower prices and increasing service quality to U.S. consumers.<sup>32</sup> Clarifying Section 54.703 as Microdevices requests would not only eliminate the perverse competitive disadvantage faced by U.S. companies, but it would also encourage foreign competitive entry into the U.S. telecommunications market.

Thus, the clarification which Microdevices seeks is the only reasonable interpretation of para. 779 of the Report and Order. International carriers such as Microdevices should be permitted to exclude from their Universal Service contribution base revenues for calls which both originate in foreign points and terminate in the U.S. and which are billed to foreign end users.

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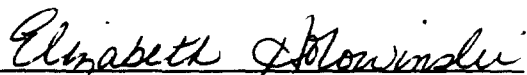
<sup>31</sup> See 47 C.F.R. §54.703(b) (1997).

<sup>32</sup> WTO Order at ¶ 4.

#### IV. CONCLUSION

For the reasons stated above, the Commission should grant the instant waiver request to allow Microdevices to exclude from its Universal Service contribution base revenues derived from providing services which originate in foreign points and terminate in the U.S., retroactive to January 1, 1998, or in the alternative, clarify that Section 54.703 of the Commission's Rules allows carriers to exclude from their contribution base foreign-billed revenues for calls which originate in foreign points and terminate in the U.S.

Respectfully submitted,

  
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